No. 82-1754

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT,
PETITIONER

v.

THE REPUBLIC OF GUINEA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a foreign state is collaterally estopped from challenging the jurisdiction of a district court in a proceeding to enforce an arbitral award where the foreign state did not appear in the proceeding to compel arbitration.

2. Whether, by agreeing to arbitrate a contract dispute under the jurisdiction of the International Centre for the Settlement of Investment Disputes (an international organization seated in the United States), a foreign state implicitly waives its immunity from suit within the meaning of the Foreign Sovereign Immunities Act of 1976 for the purpose of compelling an alternative form of arbitration.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Treaties and statutes:

Page

Treaties and statutes—Continued:

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-49a) is reported at 693 F.2d 1094. The opinion of the district court (Pet. App. 1a-6a) is reported at 505 F. Supp. 141.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1982. A timely petition for rehearing was denied on January 27, 1983 (Pet. App. 44a-48a). The petition for a writ of certiorari was filed on April 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1971 the Republic of Guinea embarked upon a joint venture with petitioner Maritime International Nominees Establishment ("MINE") to establish a company known as SOTRAMAR for the purpose of transporting Guinean bauxite to the West (C.A. App. 126-128, 207-227).[1] The contract between the parties provided that the agreement

[1] "C.A. App." refers to the appendix filed in the court of appeals.

would be governed by Guinean law and that any disputes would be resolved before a panel of arbitrators selected by the President of the International Centre for the Settlement of Investment Disputes ("ICSID") at the joint request of the parties (C.A. App. 222, 226).[2] A codicil stated that the arbitrators would be "selected by the President of the International Court of Settlement of International [*sic*] Disputes in Washington (CIRDI)" [3] (C.A. App. 229). SOTRAMAR never became a functioning commercial entity and disagreements developed between the parties over the terms of the contract (C.A. App. 126-128).

In early 1975, the parties executed a formal joint consent to submit their contract disagreements to ICSID for arbitration (C.A. App. 45). Thereafter, petitioner unilaterally determined that this consent agreement was deficient and purportedly requested Guinea to execute a new instrument (C.A. App. 8-9). Although the facts regarding Guinea's response are disputed,[4] no new agreement was executed and petitioner never formally sought a jurisdictional ruling from ICSID as to whether it would arbitrate the matter if requested to do so (C.A. App. 133, 235-236).[5]

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[2]ICSID is an international body created to facilitate arbitration of investment disputes. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090 ("ICSID Convention").

[3]"CIRDI" is the French acronym equivalent of "ICSID".

[4]Petitioner asserts (Pet. 5) that Guinea "broke off all further communications," while Guinea claims (Br. in Opp. 2) that it never received any request to execute a revised consent form.

[5]Petitioner asserts that "its Lichtenstein nationality [makes] it ineligible to use ICSID's dispute resolving machinery since Lichtenstein is not a party to the ICSID Convention" (Pet. 5). The parties stipulated, however, that for the purpose of the arbitration proceeding, petitioner was to be treated as a Swiss corporation (C.A. App. 45), and Switzerland is a party to the ICSID Convention.

In January 1978 petitioner filed a petition in the United States District Court for the District of Columbia seeking to compel arbitration through the American Arbitration Association ("AAA"), alleging jurisdiction under the Federal Arbitration Act, 9 U.S.C. 4, and the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. 1330, 1602-1611 (C.A. App. 6). In its pleadings, petitioner alleged that the ICSID arbitration agreed to by the parties was not available because of technical deficiencies in the executed joint submission (C.A. App. 9). Although Guinea apparently received due notice of the petition (C.A. App. 16, 4, 7), it did not appear to contest the district court proceedings. The court accepted petitioner's assertions regarding the unavailability of an ICSID arbitration and entered an order compelling arbitration before the AAA (C.A. App. 48).[6]

The AAA thereafter proceeded to arbitrate the dispute on an *ex parte* basis (C.A. App. 53), although Guinea was allegedly kept apprised of the proceedings (C.A. App. 102, 110-124).[7] On June 9, 1980, the arbitrators awarded petitioner more than $25 million (C.A. App. 86-91). Petitioner then returned to the district court to seek confirmation of the award (C.A. App. 51). Guinea appeared by counsel, challenged the personal and subject matter jurisdiction of the court, and moved to dismiss the petition as barred by the FSIA (C.A. App. 125). Petitioner responded, in the alternative, that Guinea had either waived its claim of sovereign immunity by choosing "a foreign forum for arbitration"

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[6]The district court made no jurisdictional findings at this time other than to note that the petition was filed pursuant to the Federal Arbitration Act, 9 U.S.C. 4, and had been duly served on Guinea in accordance with the FSIA (C.A. App. 48).

[7]Whether Guinea had actual knowledge of the arbitration proceeding is disputed. Guinea asserts (Br. in Opp. 3 n.2) that it received no notice of the arbitration proceeding and in fact learned of the subsequent judicial enforcement action "purely by chance" (*ibid.*).

(C.A. App. 243) or was barred from raising a sovereign immunity claim because it "carried on extensive commercial activity in the United States in connection with the Contract" (C.A. App. 247, 260-262). The district court rejected Guinea's jurisdictional challenge, confirmed the arbitral award and entered judgment in favor of petitioner (C.A. App. 297). The court reasoned that "by agreeing to arbitration that could be expected to be held in the United States, Guinea waived its immunity * * * within the meaning of [the FSIA]" (C.A. App. 303).[8]

On appeal, Guinea renewed its challenge to the subject matter and personal jurisdiction of the district court and questioned for the first time the constitutionality of the jurisdictional grant of the Foreign Sovereign Immunities Act of 1976 if applied to suits brought by aliens. See *Verlinden B.V.* v. *Central Bank of Nigeria*, No. 81-920 (May 23, 1983). The United States intervened in defense of the constitutionality of the Act, and also submitted a suggestion of interest with respect to whether consent by a foreign sovereign to arbitrate a dispute before ICSID waives the sovereign's immunity to suit in United States courts.

The court of appeals reversed (Pet. App. 7a-43a). Without reaching the constitutional issue subsequently decided by this Court in *Verlinden*, the court of appeals concluded that Guinea was entitled to immunity under the FSIA. The court found that Guinea had not implicitly waived its immunity by agreeing to submit disputes to an ICSID

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[8]The district court also found (C.A. App. 303-304) that, as a result of certain meetings held to promote SOTRAMAR, Guinea had lost its sovereign immunity by engaging in "commercial activities within the United States" and "commercial activities outside the United States that have a 'direct effect' within this country." 28 U.S.C. 1605(a)(2). These findings were set aside by the court of appeals (Pet. App. 26a-43a) and are not in issue here.

arbitration (28 U.S.C. 1605(a)(1)) (Pet. App. 17a-25a), nor had Guinea engaged in the kind of "commercial activity" that would cause it to forfeit its right to immunity within the meaning of the Act (28 U.S.C. 1605(a)(2)) (Pet. App. 25a-43a).

On petition for rehearing, petitioner argued for the first time that Guinea was collaterally estopped from attacking the district court's subject matter jurisdiction because Guinea had failed to challenge that jurisdiction in the proceeding to compel arbitration (Pet. 10). The court of appeals denied rehearing, noting that since Guinea's challenge constituted an attack on the personal as well as the subject matter jurisdiction of the district court, under the rule reaffirmed in *Insurance Corp. of Ireland* v. *Compagnie des Bauxites*, 456 U.S. 694 (1982), Guinea was free to ignore the initial proceedings, risk a default judgment, and challenge that judgment on jurisdictional grounds in a subsequent collateral proceeding (Pet. App. 49a).

ARGUMENT

1. Petitioner's contention that the court of appeals erroneously disregarded the doctrine of collateral estoppel (Pet. 11-15) does not merit review by this Court. The court of appeals' decision is correct and is not in conflict with the decisions of this or any other federal court.

In the first place, petitioner errs when it states that the court of appeals held "that the order to compel arbitration * * * was *res judicata* between the parties," thus implying "that the district court had the requisite subject matter and personal jurisdiction to issue that order" (Pet. 12). In fact, the court of appeals merely noted that while Guinea had directed some of its jurisdictional arguments both to the motion to compel arbitration and the motion to confirm the ensuing award, the only order subject to review was the order confirming the arbitral award, because the order to

compel arose out of a separate proceeding (Pet. App. 15a n.8).[9] The court went on to observe that petitioner "has not argued that the District Court's finding that it had jurisdiction under the FSIA in the earlier * * * proceeding to compel bars Guinea from questioning the District Court's exercise of jurisdiction in the * * * proceeding to confirm now under review" (Pet. App. 16a n.9). The court nonetheless considered *sua sponte* whether the doctrine of collateral estoppel would bar Guinea from contesting the district court's jurisdiction in the second proceeding.[10] Collateral estoppel did not apply, the court reasoned, because "[t]hat doctrine requires that even issues less basic than jurisdiction be fully litigated before they are preclusively established" (*ibid.*). Since Guinea had not appeared in the first proceeding, the court concluded that the jurisdictional issue had not been litigated in the suit to compel arbitration and was properly raised on appeal from the order confirming the arbitral award (*ibid.*).

The decision of the court of appeals is plainly correct, and petitioner's reliance (Pet. 10, 13) on this Court's recent decision in *Insurance Corp. of Ireland* v. *Compagnie des Bauxites, supra*, is misplaced. Rather than assisting petitioner's cause, that decision is actually fatal to petitioner's collateral estoppel argument, because the Court reaffirmed the well-established rule that "[a] defendant is always free to ignore * * * judicial proceedings, risk a default judgment,

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[9]Petitioner apparently does not object to the court of appeals' determination that the second proceeding was independent of the first proceeding, although it had argued to the contrary in the district court (C.A. App. 254).

[10]The court of appeals noted correctly that because the prior motion to compel adjudicated a different claim than the motion to confirm, any preclusive effect would derive from the doctrine of collateral estoppel, not *res judicata* (Pet. App. 16a, 48a). See *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948).

and then challenge that judgment on jurisdictional grounds in a collateral proceeding" (456 U.S. at 706). Petitioner asserts that this rule applies only to personal, not subject matter, jurisdiction and contends that lack of subject matter jurisdiction "was the sole basis for the Court of Appeals' reversal of the order to confirm the award" (Pet. 13). But the Court in *Compagnie des Bauxites* restated the familiar rule that "principles of estoppel do not apply" to issues of subject matter jurisdiction because "no action of the parties can confer subject-matter jurisdiction upon a federal court" (456 U.S. at 702). Moreover, even assuming that the rule expressed in *Compagnie des Bauxites* could properly be limited to questions of personal jurisdiction, the decision of the court of appeals is still correct because under the FSIA's "interlocking provisions governing the separate issues of subject matter jurisdiction, sovereign immunity, and personal jurisdiction" (Pet. App. 17a), a lack of subject matter jurisdiction "also deprives the court of personal jurisdiction" (*id.* at 18a).[11] See *Verlinden B.V.* v. *Central Bank of Nigeria, supra*, slip op. 8 n.14.

Petitioner is also incorrect in asserting that footnote nine of the *Compagnie des Bauxites* opinion "leave[s] no doubt that subject matter jurisdiction may not be collaterally attacked so long as the party has had the opportunity to litigate that issue" (Pet. 13). Although a "party that has had an opportunity to litigate the question of subject-matter

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[11]Under 28 U.S.C. 1330(b), "[p]ersonal jurisdiction over a foreign state * * * exist[s] as to every claim for relief over which the district courts have jurisdiction under [28 U.S.C. 1330(a)] where service has been made under section 1608." Under 28 U.S.C. 1330(a), courts have jurisdiction only as to claims "with respect to which the foreign state is not entitled to immunity." Thus, both personal and subject matter jurisdiction must exist before suit may be brought against a foreign state under the FSIA.

jurisdiction may not * * * reopen that question in a collateral attack upon an adverse judgment" (*Insurance Corp. of Ireland* v. *Compagnie des Bauxites, supra*, 456 U.S. at 702 n.9), Guinea has not, in fact, had a prior "opportunity" to litigate the jurisdictional question presented here because it did not appear in the earlier proceeding to compel arbitration. See *Baldwin* v. *Traveling Men's Association*, 283 U.S. 522, 525 (1931) ("If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue [of lack of jurisdiction] in the present action, because it would never have had its day in court with respect to jurisdiction").[12] Furthermore, a principal case

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[12]The Foreign Sovereign Immunities Act of 1976, together with the fact that Guinea has not, prior to this litigation, had its "day in court" on its claim to sovereign immunity, defeat petitioner's invocation of collateral estoppel. Under the FSIA, the district court's jurisdiction is dependent upon a finding that "the foreign state is not entitled to immunity" (28 U.S.C. 1330(a)). Foreign states, however, are "immune from the jurisdiction of the courts of the United States and of the States" unless an exception is found in the FSIA or applicable international agreements (28 U.S.C. 1604). Statutory exceptions exist when immunity has been waived (28 U.S.C. 1605(a)(1)) or the claim arises from specified commercial activities of the foreign state (28 U.S.C. 1605(a)(2)). The Act further provides that "[n]o judgment by default shall be entered by a court of the United States or of a State against a foreign state * * * unless the claimant establishes his claim or right to relief by evidence satisfactory to the court" (28 U.S.C. 1608(e)). Accordingly, even if a foreign state does not appear to assert its immunity defense, the district court still must verify that immunity is unavailable and that the criteria prescribed by Congress have been satisfied. See, *e.g. International Association of Machinists* v. *OPEC*, 649 F.2d 1354, 1356-1358 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982); *Ipitrade International, S.A.* v. *Federal Republic of Nigeria*, 465 F. Supp. 824, 827 (D. D.C. 1978). See also *Verlinden B.V.* v. *Central Bank of Nigeria, supra*, slip op. 8. No such findings were made by the district court in the proceeding to compel arbitration. Indeed, those findings were not made until Guinea raised its sovereign immunity defense in the proceeding to confirm the arbitral award. Because, under the express terms of the FSIA, the district court lacked jurisdiction over the earlier proceeding to compel arbitration, the court of appeals correctly refused to hold that Guinea was estopped from litigating the sovereign immunity issue in the subsequent confirmation proceeding.

cited in footnote nine of *Compagnie des Bauxites—Chicot County Drainage District* v. *Bank*, 308 U.S. 371 (1940)—has been held to be inapposite where sovereign immunity is at issue. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940).[13] See also *Durfee* v. *Duke*, 375 U.S. 106, 114 (1963). There is, therefore, no reason to conclude that Guinea's failure to assert sovereign immunity in the proceeding to compel arbitration precludes it from raising the defense in a subsequent confirmation action.[14]

2. The court of appeals' decision that the ICSID arbitration agreement did not "foresee * * * a role for the United States courts" (Pet. App. 25a) in the circumstances of this case is correct and does not "undermine[ ] the strong

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[13]In *United States Fidelity & Guaranty Co.*, the Court noted that the principles announced in *Chicot County* may not apply to cases involving sovereign immunity. In *Chicot County*, the Court (309 U.S. at 514-515; footnotes omitted; emphasis added):

> explicitly limited [its] examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy. To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts. *No solution was attempted of the legal results of a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit.*

[14]In any event, the policy underlying the related doctrines of res judicata and collateral estoppel is not self-executing; the defenses must be properly pleaded or otherwise called to the court's attention. See 1B J. Moore & T. Currier, *Moore's Federal Practice* para. 0.405[1], at 629 (2d ed. 1982). Here, petitioner did not assert either doctrine prior to filing the petition for rehearing in the court of appeals (Pet. App. 16a-17a n.9; Pet. 10). The salutary policy of the doctrines, which is to put an end to litigation at some reasonable time after there has been an opportunity to litigate the relevant issues, cannot be realized if they are not timely invoked. See *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948); *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979).

national policy favoring the arbitrability of transnational commercial disputes" (Pet. 19). In the first place, petitioner fails to acknowledge the narrow scope of the court of appeals' ruling, which the court carefully limited to this particular ICSID arbitration agreement (Pet. App. 25a). More importantly, however, the court of appeals' analysis of ICSID arbitration procedures is correct, and the decision promotes rather than hampers the national policy favoring arbitration of international commercial disputes.

a. The court of appeals carefully analyzed the ICSID Convention to determine whether the agreement between petitioner and Guinea to submit their dispute to arbitration before ICSID constituted an implicit waiver of sovereign immunity under the terms of the FSIA, 28 U.S.C. 1605(a)(1). See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 18 (1976).[15] The court concluded (Pet. App. 23a), *inter alia*, (1) that the primary motivation for the ICSID Convention was the recognition that international methods of dispute settlement should be available in addition to national processes (ICSID Convention, Preamble); (2) that consent of the parties to arbitration under the ICSID Convention is exclusive of any other remedy (art. 26); and (3) that ICSID processes are self-executing in that once a proper request is submitted to ICSID an arbitral tribunal is immediately constituted, the tribunal decides the issues of its own jurisdiction, and awards rendered by the tribunal are certified as binding and enforceable (arts. 36, 41, 49, 53).

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[15]H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. 18 (1976), states that courts have found implicit waivers of sovereign immunity "where a foreign state has agreed to arbitration in another country * * *." The district court held that Guinea had implicitly agreed to arbitration in the United States by agreeing to ICSID arbitration because ICSID is located in Washington, D.C. (Pet. App. 5a).

The court of appeals nonetheless declined to rule broadly, as the government had suggested, that ICSID agreements generally "do not contemplate the involvement of domestic courts, at least not before a final ICSID decision is to be enforced" (Pet. App. 23a-24a; footnote omitted). Instead, the court concluded that it was unnecessary to reach that broad question because petitioner "ha[d] insisted, and [was] estopped from denying, that United States courts were powerless to compel an ICSID arbitration under this particular arbitration agreement" (*id.* at 24a). Because the "key reason" why an agreement to arbitrate in the United States can be viewed as an implicit waiver of sovereign immunity is "that such agreements could only be effective if deemed to contemplate a role for United States courts in compelling arbitration that stalled along the way," the court had no difficulty in concluding that "this particular ICSID agreement was not an agreement 'to arbitrat[e] in another country' that waives sovereign immunity under the FSIA" (*id.* at 24a-25a). In these circumstances, there is no merit to petitioner's contention (Pet. 15-17) that this holding, limited as it is to the facts of this case, will frustrate future international arbitration agreements by making them legally unrealizable.

b. In any event, petitioner has not demonstrated that there is a need for United States courts to intervene in the enforcement of ICSID arbitration agreements prior to the entry of an arbitral award, and we do not believe that any such need exists. ICSID arbitration agreements are not only self-executing in the ways noted by the court of appeals (Pet. App. 23a), but in other ways as well. For example, once mutual consent to ICSID's jurisdiction has been given, either of the parties may invoke the ICSID process and proceed to arbitration, even in the face of opposition or refusal to participate by the other party (ICSID Convention, *supra*, arts. 39 and 45). A resulting default award has

the same binding status as one reached through a joint proceeding (arts. 45 and 54). Thereafter, mandatory enforcement of ICSID awards is available in United States courts, in accordance with the ICSID Convention as implemented by the Convention on the Settlement of Investment Disputes Act of 1966, 22 U.S.C. 1650-1650a.[16] Thus, the enforcement of valid ICSID arbitral agreements is assured by procedures established by the ICSID Convention, ICSID rules, and special implementing legislation.[17] Accordingly, in our view, an agreement to an ICSID arbitration—without more—cannot be taken as indicative of an intent to waive sovereign immunity and submit to United States judicial processes for compelling an alternative, domestic arbitration because the ICSID process is a distinct international method of dispute resolution, with domestic courts playing only a limited role in the enforcement of ICSID awards.

Were our courts to find an implied waiver of immunity on the basis of consent, or attempted consent, to ICSID jurisdiction—as did the district court below—serious damage would result to the ICSID dispute resolution process. If the contracting states to the ICSID Convention faced the prospect of having their reference of a dispute to ICSID interpreted as a submission to United States domestic jurisdiction, many states might forego the ICSID process in the

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[16]The enforcement of ICSID awards is thus on an entirely separate footing from awards within the framework of either the Federal Arbitration Act, 9 U.S.C. 1-14, or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997; 9 U.S.C. 201-208.

[17]It is impossible to say whether the agreement between petitioner and Guinea would have been enforceable through these procedures because it was never formally submitted to ICSID, and ICSID is the judge of its own jurisdiction (ICSID Convention, *supra*, art. 36).

future. This result would jeopardize the effectiveness of ICSID as a means of dispute settlement for American investors, and ultimately could jeopardize the ability of American citizens to secure investment opportunities abroad. For this reason, the court of appeals' decision furthers rather than hinders the national policy of this country with respect to the arbitration of investment disputes.[18]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1983

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[18]The court of appeals did not address, nor do we, the question of whether and to what extent an ICSID arbitration agreement may constitute a waiver of immunity for purposes of judicial enforcement and execution of an ICSID arbitral award.